

BEFORE THE

**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Implementation of Section 309(j)  
Of the Communications Act —  
Competitive Bidding

PP Docket No. 93-253

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To: The Commission

**COMMENTS OF INTERACTIVE AMERICA CORPORATION**

Interactive America Corporation, Inc. ("IAC"), by counsel and pursuant to Sections 1.415 and 1.419, hereby submits its comments on the Commission's Further Notice of Proposed Rulemaking, FCC 96-330, slip op. (released September 10, 1996) ("Notice") in the above-captioned proceeding. In the Notice, the Commission has solicited public input concerning proposed revisions to the competitive bidding rules for the Interactive Video and Data Service ("IVDS"). In particular, the Commission has stated its belief that the record previously established in connection with the auction of IVDS spectrum is inadequate to support the race- and gender-based bidding preferences that were originally established. It has also expressed concern that taking the time to provide the public with an opportunity to augment the existing record would be unduly time consuming and could impede the development of competition in the IVDS industry by giving those already licensed too great a head start vis-à-vis future IVDS auction winners. Accordingly, the Commission has proposed to do away entirely with the race- and gender-based preferences so that it can move quickly to auction the remaining IVDS

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spectrum. The Commission has also proposed to modify certain eligibility and bidding rules for future IVDS auctions.

**Background and Statement of IAC's Interest in This Proceeding**

IAC was established for the purpose of securing IVDS licenses in strategically-selected markets throughout the United States. It was the winning bidder for IVDS licenses in fifteen of the MSA markets auctioned by the FCC on July 28-29, 1994. These markets, and the unadjusted winning bids made for the IVDS spectrum are listed below:

CITY	BAND	BID
San Diego, CA	A	3,400,000
San Jose, CA	A	2,900,000
San Antonio, TX	A	1,200,000
Memphis, TN	A	1,200,000
Salt Lake City, UT	B	750,000
Oklahoma City, OK	B	500,000
Nashville, TN	A	1,600,000
Honolulu, HI	A	825,000
Tulsa, OK	A	425,000
Las Vegas, NV	B	1,500,000
Lakeland, FL	A	675,000
Santa Barbara, CA	A	450,000
Monterey, CA	A	450,000
Reno, NV	A	850,000
Ft. Pierce, FL	A	425,000

Events occurring after the auction, summarized below, remain the subject of litigation between IAC and the Commission, but have relevance to certain issues raised in the Notice.

In the immediate aftermath of the auction, in the week before initial downpayments were due, IAC learned from multiple independent sources that significant questions were being raised concerning the availability of IVDS equipment. In particular, it was reported to IAC — accurately as it later developed — that EON Corporation, the sole potential equipment supplier that had received “type acceptance” approval of its technology, would not actually be producing significant pieces of consumer electronic gear that had been prominently touted by EON in its brochures.<sup>1/</sup> Significantly, many of the FCC’s own representations in its auction promotional literature appear to have been based on EON’s claims for the IVDS service.

In light of these substantially changed post-auction circumstances, IAC did not believe that it would be possible for it, or any other licensee, to meet a strict one-year build out requirement that the Commission had previously established for IVDS. Although this requirement had been adopted in connection with the FCC’s original procedures to assign IVDS licenses through random selection, the Commission nonetheless made clear in informational material created specifically for IVDS auction participants that it “did not intend to relieve any IVDS license of the construction requirements on the basis that development took longer than

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<sup>1/</sup> See IAC Petition for Reconsideration filed October 2, 1995. Among other problems with the EON technology, ongoing patent litigation cast doubt on the company’s ability to commence manufacturing equipment for sale to new IVDS licensees.

anticipated.”<sup>2/</sup> Faced with this declaration concerning the agency’s prospective view of construction milestone waivers, the substantially changed — and highly unusual — circumstances in the IVDS equipment market, and its very immediate obligation to make a downpayment of approximately \$1.4 million, IAC considered it prudent to seek FCC guidance concerning these obligations before committing these funds. Absent agency clarification, IAC and the other winning bidders could have been subject to default upon failing to meet the one year construction deadline. Accordingly, IAC timely-sought on August 8, 1996 a brief extension of the downpayment deadline to permit the FCC to address these concerns and the adverse impact on the public interest of this prevailing uncertainty. As part of this request, IAC offered to pay interest on the amount it owed during the period prior to FCC grant of its request.

Within one month of IAC’s waiver request, the FCC had instituted an investigation of IAC and one other IVDS bidder that had sought a similar waiver of the downpayment deadline instead of submitting payment, and the FCC’s Common Carrier Bureau had summarily rejected IAC’s request for extension, along with a number of other waiver requests. IAC believes the Commission’s rationale for rejecting IAC’s request is flawed and it is challenging it before the U.S. Court of Appeals for the D.C. Circuit. See Interactive America Corp. v. FCC, No. 96-1320 (D.C. Cir., filed September 6, 1996).

The Commission has since repealed the one-year IVDS build-out requirement in consideration, in part, of the very equipment availability problems that IAC raised in its extension

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<sup>2/</sup> See FCC Public Notice, Mimeo No. 43550, at 8 (dated June 17, 1994) (answer to Question 5-2).

request immediately following the auction.<sup>3/</sup> In addition, the FCC issued a stay of the IVDS installment payment program in order to address issues raised by licensees concerning both the amount and timing of their scheduled payments.<sup>4/</sup> Thus, the fears initially raised by IAC have been validated by subsequent events — the Commission has even stayed payment deadlines long enough to address licensee concerns, including those related to the unsettled IVDS equipment market. Indeed, more than a year-and-a-half after the issuance of the first IVDS licenses to auction winners, IAC is not aware that any licensee has commenced construction of an IVDS system and the original “type accepted” technology provider has apparently abandoned the IVDS equipment market.

### **Discussion**

#### **1. Minority- and Gender-Based Bidding Preferences.**

IAC strongly disagrees with the Commission’s tentative decision to abandon the gender- and minority-based preferences previously adopted under the mandate of Section 309(j) of the Communications Act — which explicitly provides that the Commission must ensure that “designated entities,” including minority- and woman-owned businesses, are offered enhanced opportunities to participate in the provision of spectrum-based telecommunications services.<sup>5/</sup> The Commission states that it has balanced this statutory obligation against the Act’s requirement

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<sup>3/</sup> See Amendment of Part 95 of the Commission’s Rules to Modify Construction Requirements for Interactive Video and Data Service Licensees, 11 FCC Rcd 2472, 2473 (¶ 6) (1996).

<sup>4/</sup> See Order, DA 95-2029 (Wireless Tel. Bur. September 22, 1995).

<sup>5/</sup> See 47 U.S.C. § 309(j).

that it “facilitate the rapid delivery of new services to the American consumer and promote the efficient use of spectrum,” and concluded that it cannot serve both interests.<sup>6/</sup> This assessment is curiously premised on the notion that “the high number of defaulting bidders in the initial IVDS auction” has contributed to a harmful delay in the awarding of IVDS licenses which would only be lengthened if the Commission were to make an effort to examine fully the need to continue bidding credits for minority- and woman-owned businesses.<sup>7/</sup>

The Commission’s effort to evade the statutory mandate of Section 309(j) is misguided and is founded upon a faulty assumption that current IVDS licensees would have a substantial advantage vis-à-vis potential future auction winners by virtue of the fact that the first IVDS licenses were issued more than eighteen months ago. In fact, the state of the IVDS equipment market — which IAC accurately and justifiably questioned in its downpayment waiver request filed more than two years ago — has delayed the initial IVDS licensees from going forward. Only recently has the technology for IVDS begun to develop to a point where licensees can begin to look realistically toward actual system deployment — and the first equipment is still not expected to be available until the end of this year.<sup>8/</sup> For these reasons, there is no legitimate reason for the Commission to have demanded comment on an expedited basis with an eye toward abandoning its minority- and gender-based preference program and proceeding immediately with

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<sup>6/</sup> Notice at 29 (¶ 67).

<sup>7/</sup> Id.

<sup>8/</sup> See David Hilzenrath, “Watchful Eyes on Interactive TV,” Washington Post, September 30, 1996, Washington Business Section at 21.

auctions. Whether these provisions should be continued can reasonably be assessed on a more deliberative and sensible time schedule.

Just as significantly, the Commission would be ill-advised to include in any near-term IVDS auction those MSA markets for which IAC was the high bidder in the initial IVDS auction.<sup>9/</sup> As described above, these markets remain subject to a petition for review now pending before the United States Court of Appeals for the D.C. Circuit. If the Commission were to re-auction this spectrum prior to the outcome of that court case, and if another party were to successfully outbid IAC in such an auction for any one of these fifteen markets, then there would be two entities with an arguable claim on this spectrum. This circumstance would be likely to lead to additional protracted litigation following any court ruling requiring the Commission to revisit its rejection of IAC's downpayment extension request. Such an outcome would undermine the Commission's expressed interest in expediting the advent of IVDS service to the public and would instead cause harm to this nascent industry.<sup>10/</sup> Any new "winners" of IAC's spectrum would be operating under a substantial legal cloud that would, at the very least, make them extremely hesitant to take any build-out and deployment steps in the face of IAC's ongoing appeal. The Commission cannot reasonably or realistically expect such bidders to construct IVDS

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<sup>9/</sup> See page 2, supra.

<sup>10/</sup> Curiously, although it is now seeking to complete the pleading cycle in this proceeding within one month from the release of the Notice, the Commission has taken nine to ten months to rule on each of IAC's petitions for reconsideration of its downpayment extension request. To the extent that the Commission views this process as having delayed IVDS, such delay can be attributed to the Commission itself. IAC has merely sought Commission guidance concerning the effect of the FCC's IVDS construction milestones in light of IVDS equipment availability problems, as well as an opportunity to submit the downpayment for its licenses plus accrued interest.

facilities in the face of legal challenge to their rights to the underlying frequencies, so it is counterproductive to move to re-auction that spectrum.

Given both the fact that a number of significant MSA authorizations remain subject to prior claims such as IAC's and the fact that the IVDS service is only now beginning to show signs of significant development, there is no sound basis for the Commission's determination to rush a decision on the abandonment of bidding preferences for minority- and woman-owned businesses. Rather than closing the record in this proceeding one week from the submission of today's comments, as currently anticipated, the Commission should allow all parties additional time to submit comments to support, or to challenge, the existing IVDS bidding rules. This extension of time need not be unduly lengthy, but should give interested commenters a sufficient opportunity to draw together data that would provide a full record upon which the Commission can make an informed decision. IVDS licenses not subject to litigation could then be auctioned quickly.

## **2. Other Issues Concerning Bidding and Payment Procedures for Future IVDS Auctions.**

The Commission also seeks views on several possible refinements to its existing IVDS bidding and payment procedures, including proposed changes in the definition of "small business" and the application of bidding credits. IAC believes that preferences for small business entities should be retained for IVDS in order to fulfill the Commission's statutory obligations under Section 309(j). Start-up companies and existing small businesses should not be required to pay the same amounts as large and well-established companies to secure the opportunity to compete.



However, IAC agrees that the Commission should require a significant upfront payment as a means of ensuring that only companies with the resources and the commitment to make IVDS a reality are permitted to participate in the auction. The Commission's proposal to require a \$9,000 upfront payment per MSA license and a \$2,500 payment per RSA market<sup>11/</sup> should strike an appropriate balance — deterring speculators without barring participation by qualified bidders.

Finally, in light of the Commission's experience following the initial IVDS auction, IAC believes that the Commission should take the opportunity presented by the Notice to clarify how it will process and evaluate requests for waiver of IVDS payment deadlines and other IVDS auction-related rules. Bidders need assurance that the Commission will seriously evaluate requests for emergency relief and apply its rules flexibly when special circumstances warrant. IAC does not believe that its request for guidance and a modest extension of the initial IVDS downpayment deadline was given any meaningful consideration at any level of the Commission, but was instead "dead on arrival."<sup>12/</sup>

### Conclusion

For the foregoing reasons, IAC respectfully suggests that the Commission allow further comment in this proceeding to establish a complete record on the issue of race- and gender-based preferences. In no event should the Commission proceed with the re-auction of

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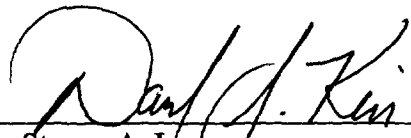
<sup>11/</sup> See Notice at 33 (¶ 77).

<sup>12/</sup> See, e.g., FCC Public Notice, "IVDS Bidder Alert," dated August 5, 1994 (stating that "[t]he Commission has not and does not intend to change its [downpayment] deadline.")

IVDS spectrum that remains subject to litigation arising from the Commission's refusal to consider timely-filed and soundly-based requests for extension of the downpayment deadline in the first IVDS auction. Should these claims be resolved in favor of petitioners, a re-auction would only give rise to further potential litigation and delay.

Respectfully submitted,

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